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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VICKY LEWIS AND GARY LEWIS, INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS AND AS ADMINISTRATOR OF THE ESTATE OF KATHYRN C. LEWIS

Petitioners,

VS.

BRUNSWICK CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

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TABLE OF AUTHORITIES

Cases

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California Federal Savings and Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 7, 25
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) ..... 7, 15, 16 ,21, 22, 28
Cipollone v. Liggett Group, Inc., No. 90-1038, Transcript of Oral Argument (Oct. 8, 1991) 6
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Doyle v. Volkswagenerk, A.G., 267 Ga. 574, 481 S.E.2d 518 (1997) *24*
Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 13
Elliott v. Brunswick Corp., 903 F.2d 1505 (11th Cir.1990) 12
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Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir. 1984) 11, 17
Fitzgerald v. Mallinckrodt, Inc., 681 F. Supp. 404 (E.D. Mich. 1987) 15
Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 26, 28
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) *20*
Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) *8*
Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) *27*
Hines v. Davidowitz, 312 U.S. 52 (1941) 26
Hunsaker v. Surgidev Corp., 818 F. Supp. 744 (M.D. Pa. 1992) 15
Larsen v. General Motors Corp., 391 F.2d 495

(8th Cir. 1968) 11
Lewis v. Brunswick Corp., 107 F.3d 1494 (11th Cir. 1977) 4
MacGillivray v, Lederle Laboratories, 667 F. Supp. 743 (D.N.M. 1987) 14
MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) 10
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 12
Maryland v. Louisiana, 451 U.S. 725 (1981) 14
Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240 (1996) 7, 14, 15, 16, 23, 24
Milwaukee v. Illinois, 451 U.S. 304 (1981) 14
Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512 (1885) 13
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New York v. United States, 112 S. Ct. 2408 (1992) 21
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Raymond v. Riegel Textile Corp, 484 F.2d 1025 (1st Cir. 1973) 11
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 10
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 13, 19, 20, 23, 28
Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989) 8
Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 12
Worm v. American Cyanamid Co., 970 F.2d 1301 (4th Cir. 1993) 8

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15 U.S.C. §1261 7
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15 U.S.C. §1392(d) 7
21 U.S.C. §360k 7
29 U.S.C. §144(a) 21
46 U.S.C. § 4306 (West Supp. 1995) 23
46 U.S.C. §4311(g) 6
46 U.S.C.A. §4311(g) 25

Other Authorities

Adler, Robert S., and Richard A. Mann, *Preemption and Medical Devices: The Courts Run Amok*, 59 Mo. L. Rev. 895 (1994) 9

American Law Institute, Reporters' Study: Enterprise Responsibility For Personal Injury (1991) 11

Atwell, Barbara A., *Products Liability and Preemption: A Judicial Framework*, 39 Buff. L. Rev. 181 (1991) 8

Ausness, Richard C., *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syr. L. Rev. 897 (1988) 19

Ausness, Richard C., *Compensation For Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 46 Wayne L. Rev. 1085 (1990) 19

CCH Products Liability Reporter ¶1570 (1993) 11
Guido Calabresi, THE COSTS OF ACCIDENTS 68-129 (1970) 18

Corboy, Philip H., and Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and*

the Theory of Implied Preemption, 15 Am. J. Trial Adv. 435 (1992) 17

H. Rep. 324, 92d Cong., 1st Sess. (1971) 22

McGovern, Francis E., *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579 (1981) 13

McGuire, E. Patrick, The Impact of Product Liability (Conference Bd. 1988) 17

Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202(1964) 13

Prosser, William L., *The Assault Upon the Citadel (Strict Liability to the Consumer)* 19

Restatement of Torts (Second) 10, 11, 14, 16, 28

Schwartz, Teresa M., *The Role of Federal Safety Regulations in Products Liability Actions*, 12 J. Prod. Liab. 305 (1989) 11

S. Rep. No. 248, 92d Cong., 1st Sess. (1971) 22, 25, 27

Shavell, Steven, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Studies 357 (1984) 11

Starr, Kenneth, et al., The Law of Preemption: A Report of the Appellate Judges Conference of the American Bar Association (1991) 9

Tribe, Laurence H., American Constitutional Law (2d ed. 1988) 8, 29

Wade, John W., *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973) 11, 18

Wolfson, Paul, *Preemption and Federalism: The Missing Link*, 16 Hastings Const. L.Q. 69 (1988) 8

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent injured plaintiffs in civil actions. State law has traditionally afforded a remedy in tort by which victims may seek fair compensation from wrongdoers.

Increasingly, defendants in state tort actions seek refuge in the doctrine of federal preemption. In too many instances, immunity from state law is urged by those whose real objective is immunity from any accountability. Where Congress has not provided for meaningful alternative regulation and remedies, preemption would result in failure of government in one of the most fundamental obligations to its citizens -- the right to legal recourse for injury. One of the tenets of ATLA's mission is to preserve the right of access to justice.

SUMMARY OF ARGUMENT

In this case, and in many others, manufacturers and others subject to federal safety regulations assert preemption as a shield against product liability suits. Their argument is that tort causes of action are simply another form of regulation. Therefore, they contend, the plain meaning of express preemption of state regulation, requirements, or standards also encompasses tort remedies.

To the contrary, tort liability differs dramatically from administrative regulation and serves other important interests. Congress cannot therefore be presumed to intend preemption of state legislative and administrative regulation to include tort remedies. At the least, courtsshould find express preemption of common law causes of action only where Congress has made its intent explicit and unambiguous.

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amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

First, courts have long viewed tort liability as not inconsistent with federal regulation, characterizing such regulations as establishing a floor, but not a ceiling, on the duty to market safe products.

Second, tort causes of action provide legal redress for injury, a fundamental right afforded by state law. It is unlikely that Congress would intend the drastic elimination of the right to seek compensation for injuries without clear indication that it so intends.

Third, tort liability, unlike regulation, does not result in imposing specific requirements or standards with respect to product design. Indeed, it imposes no legal obligation on a defendant except to compensate a particular plaintiff for the injury caused by its product. It is therefore unlikely to result in the type of conflict with federal regulation which state regulation might involve.

Fourth, although both product liability and administrative safety regulations seek to promote the safety of products, tort liability does so without direct government action. Rather, by requiring manufacturers to bear the costs of harms caused by unreasonably dangerous products, the tort system leaves decisions regarding safety to private parties responding to market forces. This Court has recognized that the indirect incentives for safety stemming from potential tort liability are not the type direct state mandates that Congress generally seeks to preempt.

The Federal Boat Safety Act, which preempts state law or regulation establishing recreational vessel standards or requirements, cannot be construed to preempt plaintiffs' cause of action. Under Georgia law, a jury in a product liability case is called upon only to determine whether the product in question is unreasonably dangerous. Although a safer alternative design is one factor to be weighed, a jury verdict would not impose any legal requirement on a manufacturer to modify its product. Congress has enacted a savings clause

which makes it unmistakably clear that product liability actions were not intended to be preempted.

The court below erred in finding that products liability actions were impliedly preempted as an "obstacle" to Congress' objective of vesting exclusive regulatory authority in the U.S. Coast Guard. Congress did not intend that regulatory authority to wholly exclude state regulation. Moreover, as this Court has held, tort liability is not inconsistent with exclusive federal regulatory authority. Courts exceed their own authority when they seek out "implied" preemption in the face of express provisions in the statute that provide a "reasonable indicium" of congressional intent.

ARGUMENT

INTRODUCTION

Congress enacted the Federal Boat Safety Act of 1971, 46 U.S.C. §§4301-4311 ["FBSA"] in response to the dismaying number of accidents associated with recreational boating. S. Rep. No. 248, 92d Cong., 1st Sess. 6 (1971). Among the injuries and fatalities cited by the Senate Committee on Commerce were 58 persons struck by boats or propellers in 1970 alone. *Id.* at 10.

The FBSA was designed "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards." As the court below explained, authority to "prescribe regulations establishing minimum safety standards for recreational boats." 46 U.S.C. §4302, is exercised by the United States Coast Guard, after consultation with National Boating Safety Advisory Council. *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1499 (11th Cir. 1977).

On Feb. 1, 1990, the U.S. Coast Guard announced that it would "take no regulatory action to require propeller guards,"

stating that "available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." The Coast Guard stated it would continue to collect and review information. *Id.*[2]

Kathryn Lewis was riding as a passenger in a recreational motor boat powered by a Brunswick outboard motor. When the boat made a sharp turn, she was thrown into the water. She was struck and killed by the spinning propeller blades.

Plaintiffs brought a product liability action under Georgia law. Specifically, plaintiffs alleged that Brunswick failed to design its motor so as to reduce the known risk of propeller blade injuries. Plaintiffs' proffered evidence that use of a protective cage over the propeller blades was a feasible means of avoiding such injuries.[3] The district court granted Brunswick's motion for summary judgment, ruling that plaintiffs' cause of action was preempted by the Federal Boat Safety Act. The Eleventh Circuit Court of Appeals affirmed.

The central premise of the Eleventh Circuit's preemption analysis is that product liability is essentially equivalent to state administrative regulations, requirements or standards for preemption purposes. Hence, in the court's view, Congress' use of the terms "law" and "regulation" in its preemption

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[2] Following a propeller strike accident involving a houseboat, the Coast Guard received some "considerable correspondence" concerning propeller guards, concluded that the number of injuries and fatalities due to propeller strikes did not warrant mandating safety devices. 60 Fed. Reg. 25191 (May 11, 1995). A request for public comment resulted in 1,994 requests favoring rulemaking on propeller guards, with manufacturers registering their opposition. 61 Fed. Reg. 13123 (March 26, 1996). The Coast Guard continues to receive public comment on the advisability of proposed rulemaking regarding propeller guards, kill switches, neutral returns and other devices designed to minimize propeller strike accidents. 62 Fed. Reg. 44507 (Aug. 21, 1997).

[3] Propeller guards have been used on rescue boats and military landing craft which operate in situations were persons may be in the water near revolving propeller blades, as well as on passenger boats in amusement parks and on certain fishing boats. *Elliott v. Brunswick Corp.*, 903 F.2d 1505, n.2 (11th Cir. 1990).

provision includes not only state positive law, but also "evidence[s] an intent to include common law claims." 107 F.3d at 1501. The court found that plaintiffs' cause of action was not expressly preempted, by virtue of an express savings provision, 46 U.S.C. §4311(g). *Id.* However, the court concluded that plaintiffs' action was impliedly preempted on the ground that liability would conflict with the exclusive regulatory authority vested in the Coast Guard. *Id.* at 1505.

The notion that administrative regulation and common law liability are so similar that congressional intent to preempt the former naturally encompasses intent to preempt the latter lies at the heart of many lower court decisions finding preemption of tort remedies. Amicus suggests that this proposition misapprehends the nature of tort law, particularly product liability law, and its relationship to government regulation.

I. CONGRESSIONAL INTENT TO PREEMPT STATE POSITIVE LAW OR REGULATION DOES NOT ORDINARILY EXTEND TO PREEMPTION OF PRODUCT LIABILITY ACTIONS.

Wouldn't Congress, having established a federal regulatory program for safety, and having expressly preempted additional or divergent regulation by state legislatures and administrative agencies, also intend to preempt state "regulation" through tort lawsuits? This is the central question presented in this case and in a great number of cases arising in the lower courts where regulated industries assert federal preemption as an immunity from product liability actions under state law. Indeed, it is a question this Court has asked. *Cipollone v. Liggett Group, Inc.*, No. 90-1038, Transcript of Oral Argument at 12-14, 18-19 (Oct. 8, 1991).

The Court addressed this question in plurality opinions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and

Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240 (1996). Although the Court there marked out the proper preemption analysis, the path is perhaps not well lighted. Amicus urges the Court to address this important issue here.

Concern for safety has prompted Congress to authorize a number of federal administrative agencies to promulgate standards or requirements related to product safety. Frequently, such legislation expressly preempts state regulation, requirements, standards, or laws. *E.g.*. National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §1392(d); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136v; Federal Flammable Fabrics Act, 15 U.S.C. §1203; Federal Hazardous Substances Act, 15 U.S.C. §1261, note (b)(1)(A); Federal Food, Drug and Cosmetics Act Medical Device Amendments of 1976, 21 U.S.C. § 360k(a). Unquestionably, Congress intended to avoid subjecting regulated industries to a multiplicity of state legislative or administrative requirements. Often, neither the text of the statute nor the legislative history indicates that Congress gave substantial thought to eliminating common law remedies.

Federal preemption of state law was not intended by the drafters of the Supremacy Clause to be a problem, but a solution to potential conflicts between the national government and state government, each exercising sovereign power over its citizens. *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976). This Court has consistently held that preemption occurs only where Congress, explicitly or impliedly, so intends. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987)(congressional intent is the "ultimate touchstone" for preemption). The judiciary's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987).

It would not be unreasonable for the court to require that if Congress truly intends to eliminate common law remedies, it do so in explicit and unambiguous language. After all, "Congress has long demonstrated an aptitude for expressly

barring common law actions when it so desires." *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989)[4] *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1305 (4th Cir. 1993)("Congress has not failed to make such preemption clear when it desires to do so.").

A "plain statement" rule instructing courts to find preemption of state common law causes of action only where Congress has explicitly referred to them would serve to protect the role of the states in our federalist system and would prevent courts from exceeding their judicial authority.

> By declining to infer preemption in the face of congressional ambiguity, the Court is . . . requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress . . . Application of the plain statement rule thus may avoid a potential constitutional problem.

Gregory v. Ashcroft, 111 S. Ct. 2395, 2403 (1991).

The strong presumption against preemption thus safeguards state autonomy. Laurence H. Tribe, American Constitutional Law § 6-25, at 479-80 (2d ed. 1988), quoted in *Gregory supra;* Barbara A. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 Buff. L. Rev. 181, 182 (1991); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Const. L.Q. 69, 112 (1988)("The courts can, however, simultaneously protect the political safeguards of federalism and afford the necessary deference to Congress by requiring that Congress speak clearly and explicitly whenever it preempts state legislation.")

At the same time, as Judge Kenneth Starr has observed, the "plain statement" rule also preserves the proper role of the

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[4] *See, e.g.*, Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §1715z-17(d), -18(e) (Supp. V 1987)(preempting any "State constitution, statute, court decree, *common law*, rule, or public policy")(emphasis added); Copyright Act of 1976, 17 U.S.C. §301(a)(1982)(preempting rights "under the *common law* or statutes of any State")(emphasis added).

judicial branch. "When judges preempt state laws in the absence of explicit congressional guidance, they in effect assume a legislative role without accepting legislative responsibility." Kenneth Starr, et al., The Law of Preemption: A Report of the Appellate Judges Conference of the American Bar Association 48 (1991).

Nevertheless, the court of appeals here and other federal courts have "discovered" an express or implied Congressional intent to eliminate product liability actions based solely on the express preemption of state law, regulation, requirements or standards. Under this view, the plain meaning of the statutory language includes all regulation, both by positive law and by common law remedies. 107 F.3d at 1501 (citing cases); Robert S. Adler and Richard A. Mann, *Preemption and Medical Devices: The Courts Run Amok*, 59 Mo. L. Rev. 895, 941 (1994).

If common law causes of action can properly be viewed as simply a form of government regulation, courts might well conclude that congressional intent to preempt state legislative and administrative regulation would also encompass tort suits.

Amicus submits that such a presumption in favor of preemption of state common law actions misapprehends the purpose and function of tort law. Administrative regulation and tort liability are fundamentally different. Indeed, each relies on the strengths of the other in a complementary fashion to protect the health and safety of Americans. Amicus suggests that federal lawmakers understand this relationship and that when Congress replaces state regulators with federal regulators, it does not ordinarily intend to close the doors of state courthouses as well.

Why would Congress not intend its preemption of state regulation to include common law damage actions? It does not suffice to state that "regulation can be as effectively asserted through an award of damages as through some form of preventive relief." *San Diego Building Trades Council v.*

Garmon, 359 U.S. 236, 247 (1959).[5] "Regulation," in the broad sense of influencing private conduct, can be accomplished by such a wide variety of means that preemption of all regulation would cripple state government. The answer lies in the fact that tort liability exerts its influence in a manner that does not pose the same potential for conflict with federal regulations as state positive law. Additionally, tort remedies serve important other interests not addressed by administrative regulation.

A. Tort Liability Is Not Inconsistent With Federal Administrative Regulation, But Serves As a Complementary Means of Promoting Safety.

One reason why Congress may be presumed to intend state common law remedies to continue along side a federal administrative scheme is that the two have historically been viewed as complements of each other.

Modern product liability law is frequently traced to the landmark decision by Justice Brandeis in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). Its most prominent formulation is set forth in Restatement (Second) of Torts §402 A (1965), which has been substantially adopted by

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[5] The Court has explained that *Garmon* was chiefly concerned with "ensuring that the primary responsibility for interpreting and applying this body of law remained with the NLRB. . . . based on the primary jurisdiction rationale." *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 502 (1984). *See also English v. General Electric Co.*, 496 U.S. 72, 86-87 n.8 (1990).

It is also significant that the *Garmon* Court carefully conditioned its ouster of state law on the understanding that access to justice would be assured through alternative federal remedies. The majority opinion emphasized the fact that NLRA established a set of procedures and remedies in place of the state law remedies displaced by the Act. 359 U.S. at 243. The concurring justices cautioned that, where Congress has not provided a remedy for tortious conduct, "there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." *Id.* at 252 (Harlan, J., concurring), quoting *United Construction Workers v. Laburnum Const. Co.*, 347 U.S. 656, 665 (1954).

at least 36 states. CCH Products Liability Reporter ¶1570 (1993). Its purpose is to provide compensation for harms caused by unreasonably dangerous products and to deter manufacturers from marketing products in a defective, unreasonably dangerous condition. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973).

Many federal safety regulations are also aimed at ensuring the safety of products entering the marketplace. However, administrative regulation differs from tort liability in so many areas that the plain meaning of "regulation" could not naturally encompass both. Indeed, they are often viewed as polar opposites, which nonetheless complement each other. *See* American Law Institute, Reporters' Study: Enterprise Responsibility For Personal Injury vol I, 47-49 (1991); Teresa M. Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 12 J. Prod. Liab. 305 (1989); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Studies 357 (1984).

In *Cipollone*, the Court emphasized "there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damages actions." 505 U.S. at 518. Indeed, federal safety regulation and state tort liability have coexisted for decades. It is a widely accepted principle of tort law that "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence when a reasonable person would take additional precautions." Restatement (Second) of Torts §288(C)(1965).

Based on this principle, courts have harmonized product liability with federal regulatory standards by viewing the latter as "a floor, not a ceiling." *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542-43 (D.C. Cir. 1984); *Raymond v. Riegel Textile Corp.* 484 F.2d 1025 (1st Cir. 1973); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968)("National Traffic Safety Act is intended to be

supplementary of and in addition to the common law of negligence and product liability."). Previously, this was the position of the Eleventh Circuit with respect to the FBSA. *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1508 (11th Cir.1990)("a manufacturer's proof of compliance with either industry-wide practices, or even federal regulations, fails to eliminate conclusively its liability for its design of allegedly defective products.").

This Court assumes that members of Congress are familiar with common law principles or ordinary tort litigation. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 67 (1989). Indeed, Congress may well intend to preserve this two-pronged means of promoting safety. *See Silkwood* at 264 (Blackmun, J., dissenting)("Compensatory damages therefore complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme.").

B. The Compensatory Function of Tort Law Serves Fundamental Rights of Access to Justice and Values of Federalism That Are Not Addressed by Administrative Regulation.

A second reason why Congress may be presumed to intend that common law actions would continue despite preemption of state administrative regulation is that Congress would not ordinarily abolish the fundamental right to a remedy for legal wrongs afforded by state law.

The FBSA, like most federal safety acts, does not provide for a private cause of action for injuries. The common-law right to seek redress in the courts for wrongful injury holds a special place in our civil justice system. One of this Court's earliest pronouncements declared that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

This right of access to justice is so fundamental that this Court has located "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). The right to a remedy is expressly guaranteed by thirty-seven state constitutions. Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 615 n.218 (1981); Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202 (1964).

There is at least a substantial question whether due process limits the authority of the federal government to abolish common law remedies without providing a reasonable alternative means for redress of injury. This was left as an open question in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 86-88, 91-93 (1978). Justice Marshall subsequently remarked that "our cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980)(Marshall, J., concurring).

In view of the importance of this right, this Court has stated "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) quoted in *Medtronic*, 116 S. Ct. 2251. As Justice Blackmun added, "The absence of federal regulation governing the compensation of victims is strong evidence that Congress intended the matter be left to the States." *Id.* at 264 n.7 (1984)(Blackmun, J., dissenting).

Because of the importance of the right of access to justice under state common law, courts should not presume that Congress would abolish tort remedies without careful consideration. Rather, this Court has instructed that there is a

strong "basic assumption that congress did not intend to displace state tort law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981). Moreover, this presumption applies not only to the existence of federal preemption, but also to the scope of express preemption provisions. *Medtronic*, 116 S. Ct. at 2250.

C. Tort Liability is Evaluative and Does Not Prescribe Specific Designs, Standards or Requirements for Manufacturers.

Congress is also unlikely to deem tort liability as equivalent to state administrative regulation for preemption purposes because tort duties and verdicts rendered thereon do not result in imposing specific standards or requirements on regulated defendants.

Mandatory standards or requirements promulgated by an administrative agency essentially usurp the design function of the manufacturer. Based on the agency's expertise and broad investigatory powers, they represent government-approved design.

Tort duties, by contrast, are rules of general applicability. Restatement of Torts (Second) §402A, for example, provides only that a manufacturer or seller who places into the stream of commerce a product in a defective, unreasonably condition shall be liable for injuries caused by it. The law does not purport to establish any specific design or requirement for any product.

As one court points out, "[i]mposing a burden on the sale in the form of potential liability for defective design is distinguishable from a state seeking to exert actual control over the mode of manufacture or distribution of a specific product." *MacGillivray v, Lederle Laboratories*, 667 F. Supp. 743, 745 (D.N.M. 1987).

A number of courts have, however, viewed a jury verdict in a product liability case as establishing a specific design

requirement. *See, e.g., Hunsaker v. Surgidev Corp.*, 818 F. Supp. 744, 751 (M.D. Pa. 1992), *aff'd*, 5 F.3d 1489 (3d Cir. 1993)("A jury's finding of liability effectively creates a new standard or duty which defendants must follow."); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 407 (E.D. Mich. 1987)(A jury award "effectively compels the manufacturer to alter its warning to conform to different state law requirements as 'promulgated' by the jury's findings.). The Eleventh Circuit in this case adopted the same view. 107 F.3d at 1501.

This Court's decision in *Cipollone* has been cited for the proposition that any express preemption of state "requirements" can be deemed to include state tort causes of action. As this Court subsequently made clear, the Court's narrow interpretation of the preemption provision involved in Cipollone does not support such a blanket abolition of common law remedies. *Medtronic*, 116 S. Ct. at 2252. Moreover, lifting the Court's language out of its context violates the basic instruction in *Cipollone* that the scope of preemption is governed by the language and background of the specific statute. As the *Cipollone* opinion makes clear, the Court's determination that some common law causes of action were encompassed within the preemption of any state "requirement or prohibition" was based on clear indications of congressional intent found in the unusual text and in the legislative and regulatory context of the statute. *Cipollone*, 505 U.S. at 520-23.

The *Cipollone* plurality opinion also strongly suggests that it was Congress' use of the term "prohibition" rather than "requirement" that indicated that some common law causes of action were to be preempted. The Court held that the 1965 Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1334, which provided "No statement relating to smoking and health . . . shall be *required*" (emphasis added), preempted only state legislative and administrative regulation, not state law damage actions. *Id.* at 505 U.S. at 519. On the other hand, the Court held that the Public Health Cigarette

Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87, which provided in §5 "No *requirement or prohibition* based on smoking and health shall be imposed under State law" encompassed some common law causes of action. In view of the plurality's statement that there is "no general, inherent conflict between federal preemption of state warning *requirements* and the continued vitality of state common law damages actions," 505 U.S. at 518 (emphasis added), it seems clear that the Court viewed the words "or prohibition" as significant in expanding the preemptive scope to include tort actions. The Court further stated:

> It is in this way that the 1969 version of 5(b) differs from its predecessor: Whereas the common law would not normally *require* a vendor to use any specific statement on its packages or in its advertisements, it is the essence of the common law to enforce duties that are either affirmative requirements or negative *prohibitions*.

Cipollone, 505 U.S. at 522 (emphasis added). In the context of that case, while a jury verdict would not require a specific design or warning, a verdict that the congressionally mandated warning constituted misrepresentation could be viewed as a prohibition. The FBSA precludes state standards or requirements, but not negative prohibitions.

The fact is that jury verdicts in product liability cases do not prescribe any specific design or safety device. Tort law does not require jurors to become design engineers. A liability verdict finds only that a defendant has breached its legal duty by marketing an unreasonably dangerous product, frequently defined as dangerous beyond the contemplation of the ordinary consumer. Restatement of Torts (Second) § 402A, comment i (1965). Neither the judge nor the jury is called upon to prescribe a safe design or proper conduct. As this court pointed out in *Medtronic*: "It will be rare indeed for a court hearing a common-law cause of action to issue a decree that has the effect of establishing a substantive requirement for a specific device." 116 S. Ct. at 2259. Indeed, amicus is not aware of any instance in which liability was accompanied

by such injunctive relief. The only "requirement" imposed upon the defendant is that it compensate the plaintiff for the harm caused.

Product liability is not equivalent to regulatory standards or requirements because a jury's verdict imposes no legal obligation with respect to the product involved. Philip H. Corboy and Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 Am. J. Trial Adv. 435, 452-57 (1992). Indeed, since the jury is required to find only whether the product is defective or unreasonably dangerous, not what a reasonably safe design would require, there is no specific standard or requirement the manufacturer could adopt, even if it so desired. A manufacturer's decision not to make such a modification will not result in any legal consequence. In fact, a significant number of manufacturers who are held liable decide not to modify the product or warnings.[6] A subsequently injured plaintiff would be required to satisfy the same tort elements as the previous plaintiff. In short, the defendant is in essentially the same position as before the verdict: take reasonable precautions to minimize the risk of harm to consumers or take the chance that a consumer will be injured and a future jury will find the product unreasonably dangerous and award damages. *See Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1540-41 (D.C. Cir. 1984); *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128, 1138 (E.D.N.Y. 1992)(noting that *Ferebee* "remains a leading case").

Because tort actions do not result in imposing specific design standards or requirements on manufacturers, they do not pose the potential for conflict with federal standards that

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[6]E. Patrick McGuire, The Impact of Product Liability 18 (Conference Bd. 1988)("Nearly half of the companies with actual product liability experience . . . have improved their product use and warning materials. And a third say that they have redesigned their product lines to improve safety.")(context suggests substantial overlap of these two groups).

state administrative regulations present. For this reason, Congress may well intend that state causes of action continue while state administrative regulations be preempted.

D. Tort Liability Exerts Only Indirect Influence on Manufacturers, Through Market Forces, Rather than Direct Governmental Action.

Finally, tort liability exerts its "regulatory" influence only indirectly, by providing market incentives for manufacturers to invest in safety, rather than by direct governmental commands. Congress is therefore unlikely to view tort liability as posing the same potential conflict with federal safety regulations that direct state regulation involves.

Product liability, in addition to its compensatory function, also serves to deter the marketing of unreasonably dangerous products. It does so by making the manufacturers of such products bear the costs of the harms they inflict. Restatement (Second) of Torts §402A, comment c (1965). In the absence of effective tort liability, manufacturers who invest in safety are at a competitive disadvantage with those who do not, and "bad" products may drive out the good. Forcing manufacturers to bear the cost of the harms caused by their unreasonably dangerous products allows the market to operate on the basis of the true social costs of products. To the extent that prevention of injury is cheaper than the compensation of the injured, there is an incentive for manufacturers to make their products safer. See, John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973).

In his classic exposition, Judge Calabresi contrasts this indirect influence exerted on the market by tort law, which he calls "general deterrence" with governmental regulatory mandates, which he labels "specific deterrence," Guido Calabresi, THE COSTS OF ACCIDENTS 68-129 (1970).

He points out that the market causes a manufacturer to internalize expenditures to improve safety, it does not do so

with respect to the costs of injury. Dangerous products are therefore priced artificially low. Calabresi, *supra*, at 70. In the absence of liability, the costs of accidents fall on the injured consumer, who may be covered by insurance or government programs. Nonliability is, in effect, a subsidy to the makers of unsafe products, giving them an economic advantage over producers who have invested in safety. *Id.* Product liability forces manufacturers to "internalize" the cost of harm caused by unreasonably dangerous products, so that the purchase price of a product reflects its true social cost. The manufacturer can then determine the most cost-efficient means of minimizing those costs. *See also* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1119-20 (1960); Richard C. Ausness, *Compensation For Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 46 Wayne L. Rev. 1085, 1140 (1990)("efficient allocation of resources is more likely if product prices reflect their actual social costs").

As one scholar summarized:

> [U]nder a general deterrence regime, manufacturers, not government officials, make decisions about product safety. . . . In contrast, specific deterrence mandates a particular choice determined by the legislature or an administrative agency. *It is a raw exercise of state power.*

Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syracuse L. Rev. 897, 927 (1988)(emphasis added).

This Court's preemption decisions have long recognized the distinction between the indirect effect of tort liability on private decisionmakers and direct government regulation. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984), the Court found no inconsistency between "vest[ing] the NRC with exclusive regulatory authority over the safety aspects of

nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards."

As the Court later explained:

> The effects of *direct* regulation on the operation of federal projects are significantly more intrusive than the *incidental* regulatory effects of such an additional award provision. . . . We believe Congress may reasonably determine that *incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988)(emphasis added). Shortly thereafter, the Court reaffirmed the importance of this distinction:

> [F]or a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels. We recognize that a claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistleblowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field.
>
> This result is strongly suggested by the decision in *Silkwood v. Kerr-McGee Corp.*

English v. General Electric Co., 496 U.S. 72, 85 (1990).

As Justice Blackmun later described the import of these decisions, "The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory impact of the common law from positive enactments such as statutes and administrative regulations." *Cipollone*, *supra*, at 112 S. Ct. at 2628, 505 U.S. 536-37 (Blackmun, J., concurring in part, dissenting in part).

The Court employed a similar analysis in *New York v. United States*, 112 S. Ct. 2408 (1992), finding that financial incentives to encourage states to enforce federal radioactive waste policy did not intrude upon state sovereignty protected by the Tenth Amendment. But "directly compelling them to enact and enforce a federal regulatory program" did. *Id.* at 2420. In *New York Conference of Blue Cross v. Travelers Ins.*, 115 S. Ct. 1671 (1995), the Court held that state laws which impose a surcharge on hospital bills covered by commercial insurers are not preempted by 29 U.S.C. §144(a), which preempts state law that "relate to any employee benefit plan." The Court acknowledged that such state laws make [nonprofit insurance] "more attractive (or less unattractive) as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans." *Id.* at 1679. However, "laws with only an indirect economic effect on the relative costs of various health insurance packages" do not "relate to" ERISA plans.

In the same vein, ATLA submits, product liability law which adds the cost of injuries to dangerous products, making safer products more attractive, are not state requirements.

II. THE FEDERAL BOAT SAFETY ACT DOES NOT EXPRESSLY PREEMPT PRODUCT LIABILITY CAUSES OF ACTION BROUGHT UNDER STATE LAW.

A. The Statute's Preemption Provision Contains No Clear Expression of Congressional Intent to Abolish

Product Liability Actions Against Manufacturers of Recreational Boats and Associated Equipment.

Cipollone's primary directive to federal courts is that the preemptive scope of a federal statute "is governed entirely by the express language." 505 U.S. at 518. "If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp. Inc. v. Easterwood*, 123 L. Ed.2d 387, 396 (1993). Without the lower court's unwarranted presumption that Congress' use of the terms "law" and "regulation" evince an intent to preempt tort remedies, there is no indication that Congress intended to preclude Petitioners' cause of action.

The FBSA was prompted by the dismaying number of injuries and fatalities associated with recreational boating. Prior to 1971, regulation of boating safety was scattered among several agencies, and the focus was almost exclusively on the owners and operators of vessels. Congress determined that further progress in reducing accidents would require regulation of vessel manufacturers. Both the Senate and House committees supporting the legislation cited to the numbers of boating accidents, including the substantial number of propeller strike injuries and fatalities. S. Rep. No. 248, 92d Cong., 1st Sess. 6 (1971); H. Rep. 324, 92d Cong., 1st Sess. 2 & 6 (1971). The legislative history contains no expression of congressional concern that damage suits constituted a burden on manufacturers or that manufacturers should be in anyway shielded from liability.

Congress included an express preemption provision in the FBSA:

> Unless permitted by the Secretary under section 4305 of this title, a State or a political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or

> imposing a requirement for associated equipment ... that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306 (West Supp. 1995).

Brunswick's position here is substantially similar to that urged by the manufacturers in *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240 (1996): "that the plain language of the statute preempts any and all common-law claims brought by an injured plaintiff." Like Medtronic's claim, Brunswick's "is not only unpersuasive, it is implausible." *Id.* at 2251.

Like the Medical Device Amendments at issue in *Medtronic*, the Boat Safety Act provides no private right of action for injured persons. "It is, to say the least, difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured" citing *Silkwood v. Kerr-McGee Corp.*, 464 U. S. 238, 251 (1984). Such a construction of §4306 would "have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation." *Medtronic*, 116 S. Ct. at 2251.

Section 4306 preempts only those state laws or regulations that establish a recreational vessel or associated equipment safety standard or impose a requirement for associated equipment. The general duties of tort law are not so specific. The product liability duties in this case are substantially those in *Medtronic*, where the Court stated:

> [T]the general state common-law requirements in this case were not specifically developed -with respect to- medical devices. Accordingly, they are not the kinds of requirements that Congress and the FDA feared would impede the ability of federal regulators to implement and enforce specific federal requirements. . . . These state requirements therefore escape pre-emption . . . because their generality leaves them outside the category of requirements that 360k envisioned."

116 S. Ct. at 2258.

The lower court apparently took the view that a jury verdict in favor of Petitioners would establish a specific standard or requirement. Setting aside the dubious assumption that jury verdicts fall within the ordinary meaning of "law or regulation" the court failed to identify any standard or requirement that a jury in this case might establish or impose.

The Supreme Court of Georgia has recently enunciated the requirements for making out an action for product liability for defective design. *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994). The ultimate question for the jury is whether, "in choosing the particular design and cost trade-offs, the manufacturer exposed the consumer to greater risk of danger than he should have." 264 Ga. at 734. In reaching this determination, the jury may be asked to weigh a number of factors. The existence and feasibility of an alternative safer design is but one factor, albeit an important factor in many cases, for the jury to consider. *Id.* at 735. It is not, however, an essential element of the claim. *Id. See also Doyle v. Volkswagenerk, A.G.*, 267 Ga. 574, 481 S.E.2d 518, 521-23 (1997). In this case, for example, the jury may consider the availability of a propeller guard to minimize the risk of propeller strikes. Indeed, a plaintiff may suggest multiple design alternatives. But a verdict of liability would not represent a finding that such guards are the sole factor rendering the product defective.

Amicus submits that permitting plaintiffs' cause of action would not result in establishing any standard or requirement for recreational vessels and associated equipment as envisioned by the preemption provision.

B. Savings Clause Clearly Indicates Congress Did Not Intend To Preempt Product Liability Actions.

A provision added by the Senate committee provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability under common law or under State law.

46 U.S.C.A. §4311(g) (West Supp. 1995).

The meaning of this savings clause -- or in Justice Scalia's phrase, "antipre-emption provision," *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 295 (1987)(Scalia, J., concurring) is plain. As explained by the Senate Report:

> This section is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. The purpose of this section is to assure that in a product liability suit mere compliance by a manufacturer with the *minimum standards* promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S. Rep. No. 92-248, reprinted in 1971 U.S.C.C.A.N. at 1352 (emphasis added).

III THE FEDERAL BOAT SAFETY ACT DOES NOT IMPLIEDLY PREEMPT STATE TORT LIABILITY.

A. Tort Remedies for Personal Injury Do Not "Stand As An Obstacle" To Federal Objectives under the FBSA.

Although the court of appeals determined that Congress did not expressly intend the FBSA to abolish product liability causes of action, the court nonetheless found implied preemption.

This Court has recognized implied "field" preemption, where Congress has intended to preempt an entire field exclusively, and "conflict" preemption, where it is impossible to comply with both federal and state regulations. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-87 (1995). The court of appeals based its holding on a narrow category of conflict preemption in which state law is preempted where

it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id., quoted in Lewis at ___.[7]

"Obstacle" preemption originated in *Hines v. Davidowitz*, 312 U.S. 52 (1941), where Court preempted an Alien Registration Act enacted by Pennsylvania. Justice Black explained the basis for the preemption:

> [T]his legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.

312 U.S. at 67-68. .

This national imperative is not present in the area of tort liability for personal injury. As Justice Marshall subsequently elaborated:

> [I]n the seminal case of *Hines v. Davidowitz*, the Court inferred an intent to preempt from the dominance of the federal interest in foreign affairs because 'the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution,' . . . and the regulation of that field is intimately blended and intertwined with responsibilities of national government. Needless to say, those factors are absent here. Rather, as

[7]Despite the lower court's attempt to distinguish *Myrick*, the Coast Guard's failure to promulgate a requirement regarding propeller guards, like the absence of an automatic brake system standard in *Myrick* defeats the preemption argument:

> We cannot say that the respondents' lawsuits frustrate "the accomplishment and execution of the full purposes and objectives of Congress." In the absence of a promulgated safety standard, the Act simply fails to address the need for ABS devices at all. . . . NHTSA has not ordered truck manufacturers to refrain from using ABS devices. A finding of liability against petitioners would undermine no federal objectives or purposes with respect to ABS devices, since none exist.

514 U.S. at 289-90.

> we have stated, the regulation of health and safety matters is primarily and historically, a matter of local concern.

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719 (1985).

Even if "obstacle" preemption can properly be applied to state tort remedies, the court erred in its application here. The Eleventh Circuit stated that Petitioners' product liability claims would conflict with Congressional intent to impose regulatory uniformity by vesting exclusive regulatory authority in the Coast Guard. 107 F.3d at 1502.

It is clear, however, that Congress did not intend the Coast Guard's regulatory authority to exclude all state authority. Congress authorized the Coast Guard to develop "minimum" standards. 46 U.S.C. §4302. Moreover, the preemption provision itself exempts from preemption state law or regulation as permitted by the Secretary under 46 U.S.C. §4305.

The sole support for the court of appeals' assertion that Congress intended the Coast Guard to have exclusive rulemaking authority is a passage taken from the Senate Report. That passage, however, confirms that Congress contemplated that state authority would continue to play a role under the FBSA. The passage explains that within the preemption section:

> A right of disapproval, however, is reserved to the Secretary to insure that indiscriminate use of *state authority* does not seriously impinge on the basic need for uniformity.

Sen. Rep. 92-248, reprinted in 1971 U.S.C.C.A.N. at 1341. (emphasis added).

Moreover, the lower court's implied preemption holding is infected with the same unwarranted presumption that common law liability actions are equivalent to state regulation for purposes of preemption. This Court has previously rejected the assumption that state tort law necessarily

conflicts a grant of exclusive regulatory authority to a federal agency. For example, Congress has adopted a comprehensive regulatory scheme with respect to safety aspects of nuclear power. Nevertheless,

> Congress did not believe that it was inconsistent to vest the NRC with *exclusive regulatory authority* over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 258 (1984). (emphasis added).

B. Courts May Not Declare State Remedies Impliedly Preempted Where Express Preemption Provisions Provide a "Reliable Indicium" of Congressional Intent.

This Court has instructed that where Congress has expressed its intent in statutory language addressing preemption, a court may not look to other sources for "implied" preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

While there are circumstances in which the legislative language addressing preemption does not entirely negate the possibility of implied preemption, there is, at the very least, a strong inference that an express preemption clause forecloses implied preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995). In this case, the provisions in the FBSA expressly dealing with preemption were abundantly sufficient to provide a "reliable indicium of congressional intent." *Id.* Amicus submits that the court therefore exceeded its authority by engaging in a search for implied preemption.

This is not a reluctance to defer to congressional prerogative. On the contrary, as one commentator states:

> When the statute contains its own preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads it, is pursuing a fundamentally lawless path.

Laurence H. Tribe, American Constitutional Law §6-25, at 483 n.8 (2d ed. 1988).

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the court of appeals below.

Respectfully submitted,

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